

OLL 85-0063/1
15 March 1985

MEMORANDUM FOR: Chief, Legislation Division

FROM:

Legislation Division
Office of Legislative Liaison

STAT

SUBJECT: Defector Citizenship Legislation

1. On March 15, 1985, I met with Deborah Owen, General Counsel (to the Majority), Senate Judiciary Committee. The subject of our meeting was the defector citizenship legislation. (You will recall that I raised the subject with her several days ago).

2. At our meeting, I gave her a copy of the draft legislation the "Foreign Intelligence Source Improvement Act", I repeated my earlier statement that this provision had been cleared as a separate bill by the Office of Management and Budget and that it would most likely be included in the proposed Intelligence Authorization Act for Fiscal year 1985, whenever that legislation cleared OMB coordination and was sent to the Congress.

3. I noted that it did not appear the Act would clear OMB in time for the Senate Select Committee on Intelligence to consider it prior to that Committee's requirement to introduce a bill to accompany its production of budget figures. As a result, it appeared that the SSCI would introduce a "clean" authorization bill. I believed, however, that the SSCI supported this legislation and thus that it might be included in the final version of the authorization bill, either as a committee substitute or a committee floor amendment. I made it clear that by providing Ms. Owen with a copy, we did not intend to force the SSCI's hand: Gary Chase, Chief Counsel, SSCI, was aware of our intentions. Our only purpose was to bring the matter to her attention and obtain an informal reading of the Bill by the Senate Judiciary Committee with particular regard to whether that Committee would seek to obtain referral of an intelligence authorization bill which contained such a provision.

SUBJECT: Defector Citizenship Legislation

4. Ms. Owen accepted copies of the legislation. She indicated she would review the matter with the staff attorney who handles immigration matters, (most likely the staff attorney for the Committee's Subcommittee on Immigration and Refugee Policy) and get back to me. She also indicated that she would be in touch with Gary Chase.

5. I thanked her for her efforts.



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Central Intelligence Agency



Washington, D.C. 20505

8 March 1986

The Honorable James C. Miller III
Director
Office of Management and Budget
Washington, D.C. 20503

Mr. Miller

I know that you share my concern regarding the increasing threat to our national security posed by unauthorized disclosure of classified intelligence information. The compromise of our intelligence sources, both human and technical, has placed lives in jeopardy and rendered expensive technical collection systems ineffective. Unfortunately, we have not been able to take effective steps to punish those who have violated their obligation to protect classified information and this has created the perception that nobody cares. We simply must restore discipline to the handling of sensitive information.

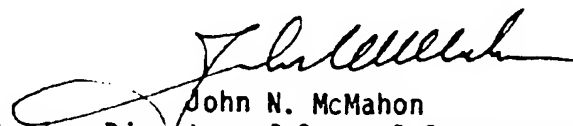
While there is no single solution to the problem of leaks, one step that can be taken is to enact legislation that would criminalize the reprehensible conduct of disclosing classified information to those outside government who are not authorized to receive it. Enactment of leaks legislation, combined with a vigorous effort to detect those who are engaged in disclosing classified information, will restore an element of risk to those who misuse classified information.

We have proposed leaks legislation as part of the draft Intelligence Authorization Bill for the past two years. Last year, objections were raised to the inclusion of leaks legislation in the Authorization Bill because the issue needed to be studied more closely and a consensus reached within the Executive Branch on whether we should attempt to enact leaks legislation. To date, I am not aware that any action has been taken to reach such a consensus.

This year we again proposed leaks legislation as part of the Authorization Bill. Once again, we were told that consideration of leaks legislation should be postponed. I do not believe we can continue to indefinitely postpone taking effective action. Too many of our nation's secrets have already been compromised to continue a business as usual attitude.

Given the exceedingly compressed time frame imposed on the authorization process by Gramm-Rudman, I do not want to jeopardize the rest of our FY 87 authorization bill because of another internal debate on this issue. Therefore, I reluctantly agree to the deletion of the leaks provisions from this year's bill. In return, I trust that OMB will support and facilitate the enactment of strong leaks legislation this year.

Sincerely,


John N. McMahon
Acting Director of Central Intelligence

OGC-85-50711
5 March 1985

MEMORANDUM FOR: Director of Central Intelligence
Deputy Director of Central Intelligence

FROM: Stanley Sporkin
General Counsel

SUBJECT: Intelligence Authorization Bill for Fiscal Year
1986

1. I would like you to reconsider your decisions on two issues raised with respect to the FY 86 Intelligence Authorization Bill. The first concerns leaks legislation; the second concerns the personal liability provision for Intelligence Community personnel. I think that a per se leaks statute would be seriously defective and therefore should not be supported. We have spent considerable time and energy considering previous per se proposals and have concluded not only that such an approach would not likely generate sufficient support on the Hill or from the public, but that such a statute would be inherently unfair and subject to legal challenge for several reasons. First, a per se approach would criminalize disclosures between government employees -- one of whom has the proper clearances or accesses, and the other who does not. Most often such disclosures are the result of mistake, and not any willful attempt to compromise national security information. Such disclosures do not result in the information's leaving government channels, nor do they present the same risks as when the information is passed to uncleared, nongovernment employees. Furthermore, such a law would be too unwieldy to administer. For example, such a bill could criminalize discussions between senior officials and their assistants and secretaries, or discussions between lower level employees, all of whom were engaged in discussions during the course of their official duties.

2. Second, the proposal that we have drafted provides certain affirmative defenses that, in my view, are absolutely essential to insure that federal prosecutions would not be subject to valid constitutional or other challenge. Those defenses would provide, first, that no prosecution can be permitted if the information that provides the basis for the prosecution was obtained from the public domain. A second defense would apply if the information was not obtained as a result of an employee's duties, and a third defense applies where the material had been submitted

for prepublication review and approved for release. I am confident that these defenses are essential if we are to seek legislation that is fair, effective in preventing unauthorized disclosures, and legally sound.

3. Still another problem with a per se statute is that prosecutions apparently could proceed simply by showing that information that the government has stamped as classified has been disclosed without authority. Given the propensity in some quarters of the government to overclassify information, I think such an approach rightly could subject the drafters to charges that a prosecution could proceed even if a laundry list were stamped and disclosed. While that argument can be addressed quite correctly that no administration ever would proceed with such a prosecution, there is no point in submitting a bill that is flawed in this respect.


4. Our leaks bill tries to avoid difficulties posed by the intent requirement of the espionage statutes and at the same time to avoid complex litigation over technical aspects of the classification system or questions concerning the substantive propriety of the classification. Our proposal would permit a defendant to challenge the classification, but places the burden on that individual to attempt to establish that it has been improperly classified and makes the question a matter of law for resolution by the judge in camera and ex parte. It is one thing to make it a crime to reveal crop estimates which, on their face, can hardly be anything but crop estimates. However, attempting a prosecution for disclosure of information because it has been classified involves a much more subjective analysis and leaves the government open to charges of censoring and prosecuting for political purposes. Given the legal challenges to these types of decisions, it seems essential to me that the bill we have drafted be preferred over a per se approach as might be proposed by the Department of Justice.

5. I say might because the Department of Justice has no specific proposal. Despite our understanding that DoJ would head a working group to attempt to reach a consensus among Intelligence Community members on the appropriate legislation to support, there has been no progress in that area.

6. With respect to the personal liability amendment, I would simply note that Senator Biden's proposal -- which like the OGC draft covers all Intelligence Community personnel -- is preferable to a proposal that is limited strictly to security determinations. In my view there is as much a reason to seek protection for personnel outside the security field as there is for those within it. While I agree that we can withdraw our proposal and support Senator Biden's proposal at the appropriate time, it seems to me that we should submit our own bill to press the issue with OMB and obtain an Administration position at the earliest opportunity.

OLL has informed us t t Senator Biden has worke closely with DOJ on this bill, so that we shouldn't expect that much opposition on the concept.

7. I am prepared to meet with you and Chuck Briggs regarding these provisions.


Stanley Sporkin

cc: Director, Office of Legislative Liaison